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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Grande Foods

Serial No. 75/816,791

Jeffrey L. Van Hoosear and Jonathan A. Hyman of Knobbe, Martens, Olson & Bear for Grande Foods.

Florentina Blandu, Trademark Examining Attorney, Law Office 112 (Janice O'Lear, Managing Attorney).

Before Cissel, Hanak and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Grande Foods, a California corporation, has filed an application to register the mark LAURA SCUDDER'S GRANDE on the Principal Register for "potato chips, and dried dip mixes composed primarily of herbs, vegetables and spices," in International Class 29, and "tortilla chips, corn chips and cheese flavored puffed corn snacks," in International

Class 30.[1] Applicant claims ownership of Registration No. 734,604 for LAURA SCUDDER'S WAMPUM INJUN CORN CHIPS, and stylized design of an Indian woman, for corn chips; and Registration No. 2,334,272 for LAURA SCUDDER'S for processed nuts and potato chips.[2]

The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark LAURA SCUDDER'S, previously registered for, respectively, "pretzels and breadsticks"[3] and "peanut butter,"[4] that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but an oral hearing was not requested.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

[1] Serial No. 75/816,791, filed January 7, 1999, based on an allegation of a bona fide intention to use the mark in commerce. The application contains the statement that "Laura Scudder's" does not identify a living individual.

[2] Applicant also claims ownership of Registration No. 1,296,586 for GRANDE for tortilla strips, corn and flour tortillas and tostada and taco shells; and Registration No. 512,759 for LAURA SCUDDER'S for salted nuts and potato chips, which is expired.

[3] Registration No. 2,073,096 issued June 24, 1997, in International Class 30, to California Pretzel Co., Inc.

[4] Registration No. 1,810,946 issued December 14, 1993, in International Class 29, to BDH Two, Inc., with an assignment to J.M. Smucker Company.

relevant to the factors bearing on the likelihood of confusion issue. *See In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Considering, first, the marks, there is no question, and applicant does not dispute, that the marks are substantially the same. Applicant's mark includes the name "Laura Scudder," in the possessive form, which is identical to both of the cited registered marks. The term "Grande" in applicant's mark is part of applicant's name and, for those familiar with applicant, could be perceived as applicant's name. However, it is equally likely to be perceived as highly suggestive, if not descriptive, of the size of applicant's listed food items, or their packaging, even by those familiar with applicant. Thus, LAURA SCUDDER'S is likely to be perceived as the dominant portion of the mark.

Turning to consider the goods involved in this case, in arguing that the record does not support a conclusion that

the goods are related, applicant states that its prior Registration No. 734,604 and the two cited registrations were originally owned by a single entity, and the fact that the registrations were subsequently assigned to different entities establishes that the goods are not related and that confusion is not likely. Applicant also contends that applicant's products (referring to its prior Registration No. 512,759, which is expired) have coexisted in the marketplace with those listed in the cited registrations for approximately seventy years without confusion and that consent to registration should be inferred from this length of coexistence; that the trade channels are different because the goods involved would be sold in different sections of grocery stores; that the third-party registrations submitted by the Examining Attorney are inapposite; and that there is no *per se* rule regarding the relatedness of food items.

The Examining Attorney contends that the goods are related because they are all snack foods that are sold in grocery stores; that the goods are likely to be sold within grocery stores in close proximity to each other; and that the evidence of third-party registrations shows that other businesses have registered their respective marks for such food products, including both applicant's goods and registrants' goods. With respect to the fact that the cited

registrations and one of applicant's registrations were all originally owned by the same entity, the Examining Attorney argues that this indicates that confusion as to source is more, rather than less, likely; and that, despite applicant's statements regarding coexistence, the record contains no consent agreement and most of the seventy-year period referred to by applicant was when the cited registrations were still owned by a single entity (noting the assignment of Registration No. 1,810,946 in 1994 and of Registration No. 2,073,096 in 1996).

The question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). *See also, Octocom Systems, Inc. v. Houston Computer Services, Inc.,* 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under

circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

The only evidence in the record submitted by the Examining Attorney consists of third-party registrations. At least eight of these registrations are for marks identifying long lists of food items as components of prepared meals or as items sold under a house brand. Such registrations are not particularly probative of the relationship between individual food items. One of the third-party registrations included only applicant's identified goods. Three of the third-party registrations are specifically for "snack foods." These include chips and puffs, as identified herein, and pretzels, as identified in one of the cited registrations.

We consider, first, applicant's goods in International Class 29, potato chips and dried dip mixes. The record includes three third-party registrations for snack foods that include both potato chips and pretzels. However, in Registration No. 2,334,272, applicant has previously registered the mark LAURA SCUDDER'S, which issued subsequent to the two cited registrations and is identical to the cited

registered marks and to the dominant portion of the mark herein. Further, the registration is for the identical goods, potato chips. In view thereof, we find that the Examining Attorney has provided no argument or evidence to support the contention that the mark in this case is not registrable for potato chips, despite the two cited registrations.

Additionally, the evidence does not establish a relationship between applicant's dried dip mixes, on the one hand, and pretzels and bread sticks[5] and peanut butter, on the other hand. The fact that these seemingly unrelated food products are listed among long lists of varied goods in third-party registrations is not enough, alone, to establish a close relationship among these food items.

Therefore, with respect to applicant's goods identified in International Class 29, we find no confusion is likely between applicant's mark and the marks in the two cited registrations.

We consider, next, applicant's goods in International Class 30, which are identified as tortilla chips, corn chips and cheese flavored puffed corn snacks are the same type of snacks as pretzels, as listed in Registration No. 2,073,096. Again, the record consists of three third-party

[5] There is no mention in the third-party registrations of bread sticks. Therefore, there is no evidence supporting a relationship between this product and any of applicant's goods.

registrations for marks for only snack food items. However, each of these registrations includes all of applicant's Class 30 chips and corn snacks as well as pretzels. Because these items are all the same type of snack food, we find applicant's goods in International Class 30 to be closely related to the pretzels in Registration No. 2,073,096.

We do not find any evidence of a relationship between applicant's goods in International Class 30 and peanut butter, listed in cited Registration No. 1,810,946, to warrant a conclusion that if identified by substantially similar marks, confusion as to source would be likely. Again, the only evidence of relationship is third-party registrations for a wide variety of food items. Peanut butter is not listed among the snack food items, nor is there evidence that peanut butter is sold in the same sections of stores as applicant's various chips and corn snacks, or that it is used with these chips and corn snacks, or that it is even considered a snack food.

Therefore, with respect to applicant's goods identified in International Class 30, in view of the differences between the goods, we find no confusion is likely between applicant's mark and the mark in Registration No. 1,810,946 for peanut butter.

However, we conclude that in view of the substantial similarity in the commercial impressions of applicant's

mark, LAURA SCUDDER'S GRANDE, and the registered mark, LAURA SCUDDER'S, in Registration No. 2,073,096 for pretzels and bread sticks, the contemporaneous use on applicant's goods in International Class 30 and on registrant's related product, pretzels, is likely to cause confusion as to the source or sponsorship of such goods.

Decision: The refusal under Section 2(d) of the Act is reversed with respect to cited Registration No. 1,810,946. With respect to cited Registration No. 2,073,096, the refusal under Section 2(d) of the Act is affirmed for the goods in International Class 30 and reversed for the goods in International Class 29. The application will go forward for publication in due course in International Class 29 only. The application will be abandoned in due course as to the goods in International Class 30.